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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re G.K., a Person Coming Under the Juvenile
Court Law.

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

J.S.,

Defendant and Appellant.

F077686

(Super. Ct. No. 16CEJ300329-1)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Fresno County. Gary Green,
Temporary Judge.

Richard L. Knight, under appointment by the Court of Appeal, for Defendant and
Appellant.

Daniel C. Cederborg, County Counsel, and Kevin A. Stimmel, Deputy County
Counsel, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Detjen, J. and Smith, J.

Appellant J.S. (father) filed a notice of appeal from the juvenile court's May 21, 2018 dispositional orders, challenging the sufficiency of the evidence supporting the court's jurisdictional finding his daughter G.K., now 18, is a minor described under Welfare and Institutions Code,¹ section 300, subdivision (c) (serious emotional damage). Appellate counsel filed a brief pursuant to *Phoenix H.* (2009) 47 Cal.4th 835, indicating there were no issues on appeal. We granted father leave to file a letter showing good cause to file a supplemental brief. Father filed a letter, contending the juvenile court prejudicially erred by failing to obtain an express personal waiver of his right to a trial on the jurisdictional allegations. We found good cause for further briefing and directed appellate counsel to brief the issue father raised as well as whether substantial evidence supports the juvenile court's removal order. We conclude the juvenile court erred in failing to advise father of his hearing rights and to elicit a waiver of rights before making its jurisdictional findings, but the error was harmless. We also conclude substantial evidence supports the court's removal order and affirm.

PROCEDURAL AND FACTUAL BACKGROUND

Dependency proceedings in this case stem from a prior child welfare case involving father and G.K. In November 2016, G.K., then 15, reported that father had been physically abusing her since they immigrated to the United States when she was 12. The physical abuse included pulling her hair, slamming her body into walls, punching and hitting her, and spitting. He also called her demeaning names. She also disclosed sexual abuse. On or about August 15, 2016, father got on top of her with her clothes on and tried to kiss her on the mouth and grabbed her buttock. She said this happened several times. He also threatened to kill her and her half siblings on or about February 14, 2015, because she reported incidents of domestic violence between father and her stepmother. G.K. observed father hitting her stepmother on several occasions

¹ Statutory references are to the Welfare and Institutions Code.

and calling her demeaning names. As a result of the abuse, G.K. was suicidal and self-harming. She was admitted multiple times for psychiatric treatment and diagnosed with post-traumatic stress disorder (PTSD) and major depressive disorder. On those facts, the juvenile court found G.K. suffered serious emotional damage (§ 300, subd. (c)) and in March 2017, placed her with her mother I.K. (mother) and awarded mother sole legal and physical custody. The court prohibited father from having visitation and dismissed the case. Not long after, G.K. was diagnosed with lupus and father obtained a custody order from the Los Angeles County Family Court, granting him joint legal and physical custody of G.K. In August 2017, G.K. moved in with father and his wife (the stepmother), with mother's permission, so G.K. could attend a high school.

In January 2018, G.K. was involuntarily detained while at school. (§ 5150.) She was feeling suicidal because father was pressuring her to sign documents, recanting the sexual and physical abuse allegations she made in November 2016. She was also distraught because father and her stepmother fought a lot. She was released from the psychiatric facility to mother who took her to father's house.

Approximately a week after G.K.'s involuntary detention, a social worker from the Fresno County Department of Social Services (department) met with her at school in the presence of her school counselor and a police officer to determine whether a protective hold was indicated. G.K. stated it was her idea to move back with father because she wanted to attend the local high school and father promised her a car. Her mother agreed with the decision. Initially, father was nice but "turned into the man he was before." She explained he no longer hit her but "mess[ed] her up" emotionally. When asked to specify, she cried hysterically, her lower jaw quivered quickly, and she started to rock back and forth. She said her stepmother told her she got lupus because she made false allegations against father and father tried to force her to sign documents recanting the abuse. If she refused, he raised his fist towards her but did not hit her. When this happened, he gave her money. She said she would be more comfortable in foster care.

The police officer placed a protective hold on G.K. based on the prior allegations of sexual and physical abuse and the department placed her in foster care.

In other conversations, G.K. stated father raised his fist to her face anytime they argued and if they were in the car, he slammed his fist into the dashboard. He blamed her for his legal problems related to the prior dependency case and told her she ruined his life. She denied recanting the sexual abuse allegations, affirming everything she said then was true. She said she hated father and wanted him to go to prison. She wanted him “off the streets” because of what he did to her and because he threatened to kill her. He had not recently threatened her directly, but told her stepmother he wanted to take her back to Malaysia to “straighten her out,” which meant he wanted to beat her until she was “in line with him.”

The department filed a dependency petition, under section 300, subdivision (b), alleging in two counts, one as to each parent (count b-1 and count b-2), that G.K. was at a substantial risk of suffering serious physical harm. As factual support under count b-1, the petition alleged mother had reason to know that G.K. was being exposed to domestic violence but failed to intervene. The petition alleged under count b-2 that father exposed G.K. to domestic violence; that on January 19, 2018, G.K. was making suicidal statements due to emotional and verbal abuse by father, which resulted in her being involuntarily detained; that on January 25, 2018, G.K. disclosed to the department that father and her stepmother fought a lot and when she intervened, her father got mad if she sided with her stepmother or vice versa. In one count under subdivision (c) (count c-1), the petition alleged G.K. was at a substantial risk of suffering serious emotional damage, citing as factual support the allegations in count b-2; i.e., her suicidal statements and involuntary detention on January 19, 2018, and exposure to father’s arguments with her stepmother. It also alleged father attempted to have her sign documents to recant allegations she made in the past regarding sexual abuse and when she refused, her father would raise his voice and fist towards her and afterwards give her money.

The juvenile court ordered G.K. detained at the detention hearing. Father did not appear, but his court-appointed attorney denied the allegations on his behalf. The court ordered the department to offer the parents and G.K. mental health evaluations and recommended treatment, the parents parenting classes and father a domestic violence assessment and recommended treatment. The court ordered no contact between father and G.K. until further order and set a combined hearing on jurisdiction and disposition for March 5, 2018. In February 2018, G.K. completed a mental health assessment and was referred for therapy.

In its report for the combined hearing, the department recommended the juvenile court sustain the petition and order reunification services for both parents.

The juvenile court continued the combined hearing and, at the parents' request, set it as a contested hearing for May 30, 2018. The court set a settlement conference for May 16. In the interim, the parents each filed a statement of contested issues, challenging the evidence in support of the jurisdictional findings, and listing G.K. as a potential witness.

Prior to the hearing, G.K.'s therapist filed a letter advising the juvenile court against calling G.K. as a witness based on her reaction while discussing it. G.K. told her therapist any discussion concerning father triggered memories of past trauma, which caused her to feel sad and hopeless. As she spoke, she was tearful, and her jaw chattered. The therapist opined testifying would be detrimental to her mental health.

At the settlement conference on May 16, 2018, father's attorney advised the juvenile court father continued to contest the jurisdictional allegations. Mother's attorney, however, indicated she was willing to resolve the jurisdictional issues and forgo a contested hearing. She filed a waiver of rights form JV-190, waiving her right to a contested jurisdictional hearing and a JV-195, waiving her right to reunification services. Minor's counsel filed a motion to exclude G.K. from testifying and informed the court that she was doing well in her placement and did not want to reunify with either parent.

On May 21, 2018, the parents appeared, assisted by a Punjabi interpreter, at the combined hearing. The court stated it had spent some time trying to reach a resolution on the counts prior to calling the case. Mother requested the addition of a sentence to count b-1, clarifying what occurred after G.K. was involuntarily detained. The court added that mother “came to pick up [G.K.] who refused to return with [her].” As to father, the court stated:

“THE COURT: ‘So as to [father], it’s my understanding that an agreement’s been reached. The Court can elect to dismiss [count b-2], and go forward on [count c-1], and will be changing the last sentence of [count c-1] to read, [‘G.K.] further disclosed her father had wanted to have her sign documents to recant allegations, and when she refused her father would raise his voice and fists towards her.[’] We’d be adding the sentence, [‘]During the relevant period [G.K.] suffered from lupus, and [father] attempted to seek help for [G.K.’] Now with regards to [count c-1], ... where does [father] stand[?’]

‘[FATHER’S ATTORNEY]: [Father] would object and let the Court decide based on the allegations. Submitting.

‘THE COURT: Okay. So with that said and in the spirit of reaching a solution, the Court will go ahead and—first of all my indicated is to dismiss [count b-2] and go forward on [counts b-1 and c-1] as amended....”

After county counsel stated it objected to dismissing count b-2, the court asked father’s attorney if he had anything else to say as to jurisdiction. He responded, “No, Your Honor.”

The juvenile court advised mother of each of her trial rights and obtained her waiver. It did not advise father of his trial rights. The court sustained the b-1 and c-1 counts and removed G.K. from parental custody. The court denied mother reunification services based on her waiver (§ 361.5, subd. (b)(14)) and ordered supervised visits for her. The court ordered reunification services for father, continued the no-contact order in effect, and set the six-month review hearing for July 2018.

DISCUSSION

I.

The Juvenile Court's Failure to Obtain an Explicit Waiver of Father's Rights Was Harmless

Father contends the juvenile court violated his due process rights when it failed to obtain a valid waiver of his right to a contested jurisdictional hearing. We agree but conclude the error was harmless.

“A dependency proceeding is civil in nature and is designed not to prosecute the parent, but to protect the child. [Citation.] Nevertheless, a parent’s fundamental right to care for and have custody of [his] child is implicated and may not be interfered with without due process of law. [Citations.] Among the essential ingredients of due process are the right to a trial on the issues raised by the petition, the right to confront and cross-examine witnesses, and to compel the attendance of witnesses. [Citation.] By adopting [California Rules of Court, rule 5.682],^[2] the Judicial Council recognized these rights are essential to a fair jurisdictional proceeding.” (*In re Monique T.* (1992) 2 Cal.App.4th 1372, 1376-1377 (*Monique T.*), citing *In re Malinda S.* (1990) 51 Cal.3d 368, 383-384 & fn. 17, superseded by statute on another ground; [former rule 1449, cited in *Monique T.*, was renumbered rule 5.682].) A parent must be advised of these rights at the initial stages of the proceedings. (Cal. Rules of Court, rule 5.534(g).)³

A parent may personally waive a contested hearing on the jurisdictional issues in a dependency proceeding by admitting the allegations of the petition, pleading no contest, or submitting the determination to the court. (Rule 5.682(d); *Monique T.*, *supra*, 2

² Rule references are to the California Rules of Court.

³ Rule 5.534(g) provides generally that in section 300 cases “[t]he court must advise the child, parent, and guardian ... of the following rights: [¶] (A) The right to assert the privilege against self-incrimination; [¶] (B) The right to confront and cross-examine the persons who prepared reports or documents submitted to the court by the petitioner and the witnesses called to testify at the hearing; [¶] (C) The right to use the process of the court to bring in witnesses; and [¶] (D) The right to present evidence to the court.”

Cal.App.4th at p. 1377 [juvenile court, not attorney, must explain rights; parent must personally waive trial rights; attorney cannot waive for parent].) If the parent submits to the jurisdictional determination in writing, *Waiver of Rights—Juvenile Dependency* (form JV-190) must be completed by the parent and counsel and submitted to the court. (Rule 5.682(d).) The rule does not mandate a written waiver for a parent to submit on the reports.

Whether a parent submits the jurisdictional determination to the juvenile court in writing or orally, rule 5.682(e) requires the court to find the parent “knowingly and intelligently waived the right to a trial on the issues by the court, the right to assert the privilege against self-incrimination, and the right to confront and to cross-examine adverse witnesses and to use the process of the court to compel the attendance of witnesses on the [parent’s] behalf; [¶] ... understands the nature of the conduct alleged in the petition and the possible consequences of an admission, plea of no contest, or submission; [¶] [and t]he admission, plea of no contest, or submission by the parent ... is freely and voluntarily made.” (Rule 5.682(e)(3)-(5).)

Here, father contested the allegations in the petition, which he apparently withdrew during an off-the-record discussion prior to the jurisdictional hearing,⁴ and settled for the dismissal of count b-2 and a modification of count c-1. His attorney then submitted the matter of jurisdiction to the court. Father did not, however, sign and submit a JV-190 as mother did. Nor did the juvenile court advise him of his trial rights as required by rule 5.682(e) and obtain a knowing and intelligent waiver of his right to a contested jurisdictional hearing. Consequently, the juvenile court erred.

When the juvenile court fails to advise a parent pursuant to rule 5.682(e) and obtain a personal waiver from the parent of his or her trial rights, the error is not, as father

⁴ The court clerk indicated on the minute order for the hearing that father withdrew the contest; however, there is no mention of it in the reporter’s transcript.

contends, structural error. It is rather trial error and subject to harmless error analysis. (*Monique T.*, *supra*, 2 Cal.App.4th at pp. 1377-1378.)

In support of his argument that the juvenile court's failure to give him the required advisements was structural error, father cites criminal cases and attempts to analogize dependency proceedings to those cases. However, our supreme court in *In re Celine R.* (2003) 31 Cal.4th 45, 58-59 (*Celine R.*) held that such an analogy is inapt. While the admission or submission of a dependency petition "affects the parent's fundamental rights, [it] does not expose the parent to deprivation of his or her personal liberty" because "the advisements we are concerned with are mandated by nonconstitutional rules of procedure, the California Rules of Court." (*Monique T.*, *supra*, 2 Cal.App.4th at pp. 1377-1378.) Further, our review of noncompliance with those court rules is governed by California's Constitution, which "prohibits a court from setting aside a judgment unless the error has resulted in a 'miscarriage of justice.'" (Cal. Const., art. VI, § 13.)⁵ (*Celine R.*, *supra*, 31 Cal.4th at pp. 59-60.) The California Supreme Court has "interpreted that [constitutional] language as permitting reversal only if the reviewing court finds it reasonably probable the result would have been more favorable to the appealing party but for the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)" (*Ibid.*) Mere possibility of a more favorable result is not enough. (*People v. Watson*, *supra*, 46 Cal.2d at p. 837.) The *Watson* standard of review applies to dependency cases. (*Celine R.*, *supra*, 31 Cal.4th at p. 60.)

There was abundant evidence supporting the subdivision (c) allegation that G.K. had suffered or was at a substantial risk of suffering serious emotional damage because of

⁵ Article VI, section 13 of the California Constitution { "pageset": "Sf8" } provides in pertinent part: "No judgment shall be set aside ... in any cause ... for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

father's threatening and manipulative behavior. The juvenile court found in the prior dependency case that father had been physically abusing G.K. for three years, threatened to kill her in February 2015, and sexually molested her in August 2016. As a result, she was suicidal and harmed herself. She required psychiatric treatment and was diagnosed with PTSD and depression. Within five months of her return to father's custody in August 2017, he resumed his abusive behavior, raising his voice and threatening to hit her with his fist if she did not recant her allegations. Within another five months, G.K. was suicidal and again in need of psychiatric intervention. Multiple people, including the social worker, school counselor, and the police officer who met with her at school, witnessed her cry hysterically and shake while discussing how father affected her emotionally. Her therapist witnessed the same reaction when discussing her traumatic experience with father. The record does not demonstrate that father would have obtained a more favorable result had the court provided him the required advisements and obtained his waiver.

Father nevertheless contends if properly advised, he would have exercised his right to a contested hearing and presented evidence that G.R.'s lupus may be the cause of her emotional reactions. Even assuming father could establish such a correlation, it would not negate other compelling evidence that explained her reactions; i.e., the fact that he physically abused her for years and sexually molested her, that her emotional reactions are triggered by those memories, and that she suffered from PTSD as a result. We conclude the juvenile court's failure to properly advise father and obtain an express waiver of his rights to a contested jurisdictional hearing are harmless.

II.

Substantial Evidence Supports the Removal Order

Father contends there was insufficient evidence of current risk of harm to justify removing G.K. from his custody. He cites the fact that she chose to live with him, signifying that he did not pose a risk of harm to her. Additionally, he claims she recanted

the sexual abuse allegations, and, in any event, the sexual and physical abuse allegations were remote and there were no subsequent incidents. Further, he asserts, the department could have strictly supervised the home situation by making unannounced visits as an alternative to removal or relied on mandated reporters at G.K.'s school to report any abuse. We conclude the evidence supports the juvenile court's decision to remove her.

"After the juvenile court finds a child to be within its jurisdiction, the court must conduct a dispositional hearing. [Citation.] At the dispositional hearing, the court must decide where the child will live while under the court's supervision." (*In re N.M.* (2011) 197 Cal.App.4th 159, 169.)

"A removal order is proper if based on proof of parental inability to provide proper care for the child and proof of a potential detriment to the child if he or she remains with the parent. [Citation.] 'The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child.' [Citation.] The court may consider a parent's past conduct as well as present circumstances." (*In re N.M., supra*, 197 Cal.App.4th at pp. 169-170.)

"Before the court issues a removal order, it must find the child's welfare requires removal because of a substantial danger, or risk of danger, to the child's physical health if he or she is returned home, and there are no reasonable alternatives to protect the child. [Citations.] There must be clear and convincing evidence that removal is the only way to protect the child." (*In re N.M., supra*, 197 Cal.App.4th at p. 170.)

Whether the conditions in the home present a risk of harm to the child is a factual issue to which we apply the substantial evidence test. (*In re N.M., supra*, 197 Cal.App.4th at p. 170.)

Substantial evidence supports the juvenile court's decision that removing G.K. from father was necessary to protect her from a continuing risk of physical and emotional abuse. Despite having lost custody of G.K. in the prior dependency case, father was unrelenting in his mental abuse and emotional manipulation of her. He threatened her

with his fist when she refused to recant her allegations and then tried to make it up to her by giving her money. All the while he knew that she was emotionally and physically fragile, suffering from PTSD, depression, and lupus. Because of father's behavior, G.K. was traumatized and suicidal. She did not want to reunify with him and, contrary to his assertion, she affirmed the sexual abuse allegations. As to father's suggested alternatives to removal, the prospect that his behavior would change even with supervision is doubtful given his history. In addition, just living in his home would undoubtedly be stressful for G.K. given the trauma she had already experienced.

We find no error.

DISPOSITION

The order is affirmed.